Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

ROBERT OWEN BAILEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does 8 U.S.C. § 2422, which requires a defendant to persuade a minor to engage in sexual activity "for which any person can be charged with a criminal offense" require the intent to commit the underlying criminal offense?

2. If 18 U.S.C. § 2422 does not require an intent to commit an illegal act, does it punish pure speech without being so narrowly tailored as to be the least restrictive means available? That is, would an interpretation as requiring intent to commit the underlying offense as a requisite of conviction be more narrowly tailored than the Sixth Circuit's intent neutral interpretation?

3. As written, does 18 U.S.C. § 2422 pose a threat of limiting legitimate free speech due to its overbreadth?

4. Are the prohibitive terms of 18 U.S.C. § 2422 so unclear as to be facially vague?

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The opinion of the Court of Appeals is reported in *United States v. Bailey*, 228 F.3d 637 (6th 2000). (Appendix A).

District Court Judgment. (Appendix B).

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STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on October 3, 2000. The jurisdiction of this Court is invoked under 28 U.S.C § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. The First Amendment, United States Constitution, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. The statute under which Petitioner was prosecuted was 18 U.S.C. § 2422(b), which provides:

> (b) Whoever, using the mail or any facility or means of interstate or foreign commerce, or within

> the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

3. The statute under which Petitioner was granted post conviction relief was 18 U.S.C. § 3143(b):

> (b) Release or detention pending appeal by the defendant.
>
> > (1) Except as provided in paragraph (2), the judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds —
> >
> > (A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c) of this title; and
> >
> > (B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in

> (i) reversal,
>
> (ii) an order for a new trial,
>
> (iii) a sentence that does not include a term of imprisonment, or
>
> (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

> If the judicial officer makes such findings, such judicial officer shall order the release of the person in accordance with section 3142(b) or (c) of this title, except that in the circumstance described in subparagraph (B)(iv) of this paragraph, the judicial officer shall order the detention terminated at the expiration of the likely reduced sentence.

4. The criminal offense "which any person can be charged" under 18 U.S.C. § 2422 that plaintiff was indicted for was Tennessee Code Annotated § 39-13-506 (2000): Statutory rape:

> (a) Statutory rape is sexual penetration of a victim by the defendant or of the defendant by the victim when the victim is at least thirteen (13) but less than eighteen (18) years of age and the defendant is at least four (4) years older than the victim.

5. A state statute used as an example of an application of 18 U.S.C. § 2422: Alabama Code § 13A-12-200.5(2000): Distribution of obscene material to minors:

> (1) It shall be unlawful for any person to knowingly or recklessly distribute to a minor, possess with intent to distribute to a minor, or offer or agree to distribute to a minor any material which is harmful to minors. Any person who violates this subsection shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than ten thousand dollars ($10,000) and may also be imprisoned in the county jail for not more than one year.

PROCEEDINGS BELOW

On February 12, 1999, in a cause then pending in the United States District Court for the Western District of Tennessee, Western Division, entitled *United States v. Bailey*, Petitioner was found guilty of three counts charging violations of 18 U.S.C. § 2422(b). (District Court Judgment).

The District Court entered judgment and Petitioner was sentenced to fifty-one months imprisonment, two years supervised release, and fined $100 on each count. (District Court Judgment).

The judgment and sentence against Petitioner were affirmed by the Court of Appeals for the Sixth Circuit, *United States v. Bailey*, 228 F.3d 637 (6th 2000). (Circuit Opinion, Bailey). (Petition for rehearing was not timely filed).

STATEMENT OF THE CASE

From August 28, 1997 to September 10, 1997, Petitioner communicated with three girls who had not yet reached the age of 18 via the Internet (TR. Vol. III, 501-02; TR. Vol. III, 372-400; TR. Vol. II, 317-337). Although Petitioner never intended to meet any of the three girls in order to engage in sexual activity, the communications contained sexually explicit language. On October 10, 1997, the District Court issued a search warrant to search the files on Petitioner's computer hard drive (mistakenly referred to as the "CPU" by the FBI in the search warrant) and to obtain information from Petitioner's Internet service provider. (Warrant). From these files, the United States discovered sexually explicit correspondence between the petitioner and each of the three girls as well as a photo one of the girls had sent to the Petitioner. The United States pursued conviction under 18 U.S.C. § 2422(b) for using the Internet to attempt to persuade minors to engage in illegal sexual activity (that activity being statutory rape). The United States, in the indictment, utilized T.C.A. § 39-13-506 (statutory rape) as the underlying crime for which the Petitioner may be criminally prosecuted, stating:

> The defendant, . . . through the use of a combined computer/ telephone system, did knowingly attempt to persuade, induce, entice, and coerce . . . , a female who was then under the age of 18 years, to engage in a sexual act, that is, oral-genital intercourse, . . . a prosecutable criminal offense under Tennessee Code Annotated, Section 39-13-506.

The Petitioner was convicted under this application of T.C.A. § 39-13-506 to 18 U.S.C. § 2422(b).

During the trial (Federal Rules of Criminal Procedure 29, Motion for Acquittal) and in a Motion for a New Trial (Federal Rules of Criminal Procedure 33) the Petitioner argued that the plain language of 18 U.S.C. § 2422(b) requires proof of the accused's intent to commit the underlying offense (in the present case, statutory rape), and that the Government failed to prove this intent. These motions were denied, the Court stating that: It is not an element of the charged offense that the defendant sexually penetrate any of the victims, nor that he have specific intent to carry out the act of statutory rape. *United States v. Bailey*, 228 F.3d 637 (6th 2000). (Circuit Opinion, Bailey).

The district court granted a Motion for release pending appeal, (18 U.S.C. § 3143) stating that:

> On the issue of whether the statute . . . requires that the Government prove that the defendant had the intent to commit the sexual acts solicited. Neither side has produced any case law on this issue and the statute itself is not clear. At trial, the court ruled that the statute does not require that the defendant have the intent to commit the sexual act, but this court finds that the issue is a substantial one of law... the issue on appeal presents a close question or at least one that could go either way. Given the facts of this case, the court considers that the issue is integral to the merits of the conviction (18 U.S.C. § 3143 Order).

On appeal, the Petitioner again raised the issue of whether 18 U.S.C. § 3143 required intent as well as whether interpretation as not requiring an intent to commit an illegal act punishes pure content-based speech. A panel sitting for the United States Court of Appeals for the Sixth Circuit affirmed the conviction, stating: "Congress has made a clear choice to criminalize persuasion and the attempt to persuade, not the performance of the sexual acts themselves." *United States v. Bailey*, 228 F.3d 637 (6th 2000). (Circuit Opinion, Bailey). The Court opined that the act does not punish content-based speech, distinguishing it from *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) stating that 18 U.S.C. § 2422(b) applies only to those who knowingly persuade, entice, attempt to persuade or attempt to entice minors and therefore does not suffer from the same overbreadth or ambiguity problems as the CDA, the statute in question in *Reno*. *United States v. Bailey*, 228 F.3d 637 (6th 2000).

REASONS FOR GRANTING THE WRIT

I. A plain language interpretation of 18 U.S.C. § 2422(b) requires intent to perform an illegal act for criminal prosecution.

The actions required for criminal prosecution under 18 U.S.C. § 2422(b) are the commission or, as in the case at hand, the attempted commission of a crime for which someone may be criminally prosecuted, creating an attempt crime.

A concise, binding statement of the general principal applied to attempt crimes is found in the Federal Jury Practice & Instructions § 21.03: The Essential Elements of the Offense

Charged states that the government is required to prove "the defendant intended to commit the crime . . . , and . . . did an act constituting a substantial step towards the commission of that crime.

As was stated in *United States v. Bilderbeck*, 163 F.3d 971 (6th Cir. 1999) a conviction for attempt consists of two elements: (1) proof of culpable intent to commit the crime, and (2) a substantial step toward commission of the crime that strongly corroborates that intent. *See United States v. Rosa*, 11 F.3d 315 (2d Cir. 1993) (in order to establish a person is guilty of an attempt, the Government must prove defendant possessed intent to commit the offense and engage in conduct amounting to a substantial step towards its commission).

In the present case, Petitioner testified that he never intended to meet any of the minors to perform the acts they described over the Internet. He was simply engaging in the common practice of Internet bantering. (TR. Vol. II, 276).

Petitioner never met with any of the minors, nor is there evidence that he ever intended to meet with any of them. (TR. Vol. IV, 576). He never spoke with any of them over the telephone. (TR. Vol. III, 401, Vol. IV, 576). He made no efforts to corroborate his intent to engage in illegal sexual acts with the three minors other than words. His conduct is evidence of the common practice of talking with people over the Internet, using false names, and talking about events that are never intended to take place.

Because 18 U.S.C. § 2422 includes "attempt" among its prohibited activities, a conviction under the statute must include intent to commit the underlying offense and proof of

some step toward committing the offense. In a divergence from this rule, the district court below affirmed the conviction, finding that if the defendant intended to persuade a minor to engage in sexual activity, it was not necessary for him to intend to actually engage in a sexual act. In fact, in the underlying opinion, the Sixth Circuit has stated: "A conviction under the statute only requires a finding that the defendant had an intent . . . to attempt to persuade." *United States v. Bailey*, 228 F.3d 637 (6th 2000). (Circuit Opinion, Bailey).

This "intent indifferent" interpretation of the statute could lead to some strange results. To offer an example, it is reasonable to believe that an adult citizen of Tennessee who has no intent to engage in an illegal sexual act, but who sends a letter via U.S. mail to a minor in Alaska with the words "please have sex with me" in the body of the letter, could be prosecuted under the Sixth Circuit's "intent indifferent" interpretation of the 18 U.S.C. § 2422(b).

In protection of minors from harmful sexual activity, 18 U.S.C. § 2422(b) has a plainly legitimate sweep but through an improper interpretation has the potential to reach a number of impermissible applications. To avoid these applications, the statute must be interpreted as requiring an intent to engage in some illegal sexual activity.

II. If 18 U.S.C. § 2422(b) does not require intent to perform an illegal act, it criminalizes pure speech in violation of the First Amendment.

If 18 U.S.C. § 2422 does not require a finding of intent to commit an illegal sexual act, it prohibits free speech without being so narrowly tailored as to be the most

restrictive means available. In the case at hand, the Petitioner's activity amounted to mere bantering over the Internet. While the United States Supreme Court has recognized certain classes of speech that do not receive first Amendment protection (such as obscenity, advocacy of imminent lawless behavior, defamation, and "fighting words"), bantering does not fall within any of these unprotected categories. By prohibiting bantering, the statute prohibits constitutionally protected speech, in violation of the First Amendment.

In order to restrict content-based speech, the government has the burden of proving that the regulation is necessary to protect a compelling state interest. This Court held recently in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), that provisions of the Communications Decency Act (CDA), which prohibited sending patently offensive communications through interactive computer services to minors, violates the First Amendment by restricting content-based speech, finding that the government could show no purpose compelling enough to outweigh the statutes "chilling" effect on speech. *Id.* at 869.

This Court also stated that as a matter of constitutional tradition, in the absence of evidence to the contrary, a court must presume that governmental regulation on the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. Although the government has a legitimate interest in protecting minors from offensive language, this interest is not so compelling as to outweigh the free speech guarantees of the First Amendment and to place a content-based restriction on constitutionally protected speech.

In addition to proving a compelling purpose, the government has the burden of proving that the regulation is so narrowly tailored as to be the least restrictive means available.

In the present case, requiring a finding of intent to engage in the illegal sexual conduct would better ensure that the state's interest in protecting minors from engaging in sexual acts or prostitution is achieved without prohibiting pure speech.

III. The statute as interpreted by the Sixth Circuit poses a danger of limiting legitimate free speech due to its overbreadth.

The Sixth Circuit's interpretation of 18 U.S.C. § 2422(b), specifically holding that the statute does not require an intent to commit a criminal act, could have a "chilling" effect on constitutionally protected speech. Interpreting the statute as not requiring an intent to engage in illegal activity poses a realistic danger of deterring those who wish to engage in legally protected expression to refrain from doing so rather than risk prosecution. (The overbreadth standard set forth by this Court *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987)).

For example, would the mail order company which sends an advertisement to a minor in Alabama offering a subscription to an anthropology magazine which routinely contains pictures of women in other cultures with their breasts uncovered be in violation of the Alabama Code § 13A-12-200.5 for "attempting" to persuade the minor to view partially nude photographs? Code of Alabama § 13A-12-200.5 (applying only if the minor is also an unmarried person).

Under the Sixth Circuit's "intent indifferent" interpretation, this example would hold true even if the publisher had no intent to arouse or stimulate the minor as required by the Alabama statute, just as under this interpretation it was held that the Petitioner need not penetrate (as required by the Tennessee statute) or have intended to penetrate a minor.

By not requiring a commission or even the intent to commit a crime, the government will have to apply their own standards in determining what acts (or words, as in the case at hand) create a violation of the offense, creating viewpoint discrimination.

Because the statute permits a typically intrastate offense ("which any person can be charged with") to be committed via the mail or facility of interstate or foreign commerce, the decision of whether an offense has been committed will often hinge on a particular message. Anytime the state must evaluate a message and determine if it is controversial or, as in this case, criminal, there is a substantial danger of viewpoint discrimination. *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995). This is because the effect of any message depends not only on the intent of the speaker but on the opinions of the listener. *Consolidated Edison Co. of New York v. Public Service Comm'n*, 447 U.S. 530 (1980). In fact, the Sixth Circuit has determined that the criminalization of the message depends only on the viewpoint of the listener, as the intent of the sender is not a requisite of the offense. *See United States v. Bailey*, 228 F.3d 637 (6th 2000) (Sixth Circuit Opinion). There must be a strong inference that any statute which allows the state to establish if an expressive message is criminal without looking to the intent of the speaker allows for viewpoint discrimination.

When a statute poses a threat to constitutionally protected speech, the remedy is not to rewrite the statute, but to determine if a more limited or narrow construction would remove the danger. *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995). The recognized cannons of construction require that when a court interprets a statute in a way that could abridge constitutionally protected speech, the Courts above have a duty to examine that interpretation and determine if it can be narrowed to remedy the unconstitutional abridgement. *Chapman v. United States*, 500 U.S. 453 (1991).

This Court, by interpreting 18 U.S.C. § 2422(b) as requiring an intent to commit the underlying criminal offense, could remove the overbreadth and danger of viewpoint discrimination. This requirement would provide the trial court with a standard for determining when the statute is applicable. It would not place an undue burden on the state to prove that the accused intended to actually commit an offense "which any person can be charged with," and by requiring proof of this requisite intent the danger of viewpoint bias being attached to a particular message would be lifted.

IV. As the prohibitive terms of 18 U.S.C. § 2422(b) do not clearly define the criminal activity, the statute is facially vague.

The prohibitive terms of 18 U.S.C. § 2422(b) are: to use the mail or other means of interstate or foreign commerce to persuade a minor to participate in prostitution or any sexual activity for which any person can be charged with a criminal offense, or to attempt to do so.

By adding the attempt clause, Congress has created a facially vague statute which does not clearly define the criminal activity (In 1996, part (b) was added including the words "or attempts to do so." The attempt clause was also added to part (a) in 1998). A person of ordinary intelligence could easily assume that the statutory intent was to prohibit the use of mail or another form of commerce to persuade minors to participate in prostitution or a criminally chargeable offense, OR to attempt to use the mail or interstate commerce to persuade minors to perform these acts. It is reasonable to assume that the action or failed action (the attempt) which Congress was referring to was that which was created in this statute, not the underlying offense. In the present case the petitioner was convicted of using the Internet in an attempt to perpetrate statutory rape. While statutory rape is an offense in Tennessee "which any person can be charged with," attempted statutory rape is not. He neither committed an offense "which any person can be charged with" nor intended to do so.

The prohibitive terms of 18 U.S.C. 2422(b) are not clearly defined so that an ordinary person could identify the applicable standard for inclusion or exclusion, the standard for determining a statute's vagueness. *See Grayned v. City of Rockford*, 408 U.S. 104 (1972).

CONCLUSION

The District Court incorrectly affirmed the trial courts interpretation of 18 U.S.C. § 2422 as not requiring a finding of intent to commit a sexual act. This interpretation is in contravention to the plain language approach necessary in interpreting statutes and to the precedents of this Court.

If the trial court's interpretation is correct, then the statute creates a question of constitutional importance: it places a content-based restriction on free speech without being the least restrictive means available. Additionally, as interpreted, the statute suffers from several problems of construction, including overbreadth which in turn allows for viewpoint discrimination on the part of the government and facial vagueness.

Respectfully submitted,

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